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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 192.

Supreme Court, U.
FILED.
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JAMES H. McKENNEY
CLERK

JOHN J. ALLEN, APPELLANT,

vs.

THE UNITED STATES, APPELLEE.

APPEAL FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR APPELLANT.

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Appellee's brief, page 2, referring to Item 1, as found, says: "The accounting officers allowed 15 cents per folio for said complaints, and appellant now claims 5 cents additional."

To correct a possible inference from this that the 5 cents additional was a disallowance in a former account, we refer to the finding (R., p. 7) that the 15 cents was the full amount *charged* in the former account, and that none of the fees now claimed were ever charged in any account other than the one now sued upon, which was a *new* account.

Counsel for appellee, on page 4 of his brief, contends that it was the duty of the appellant before drawing a complaint to satisfy himself of the probability of the commission of the offense alleged, as he had the means to satisfy himself on this point, because he was chief supervisor of elections as well as commissioner, and had in his hands, counsel says, lists of all persons entitled to vote.

The fallacy of this contention is based upon the fact that the appellant happened to hold the office of commissioner and chief supervisor of elections. This fact does not sustain his assertion, and he cites no authority to support it. Neither is there any finding of fact in the record to sustain such a statement.

There is no finding of fact in the record that appellant did not satisfy himself of the probability of the commission of every offense in these complaints.

The presumption of law is that an officer does his duty in the absence of proof to the contrary. This presumption is fortified by the fact shown by the record that the accounts containing these complaints were approved by the United States court in the district where the services were rendered, adjudging "that the services herein charged for have been necessarily and actually performed."

Further, the Record, page 10, under Item 23, shows that the appellant made a distinction between cases in which he was satisfied that an offense had been committed and those in which, on further examination, it appeared that the offense, although charged, should not warrant an arrest. In Item 23 he charged for complaints in the cases in which, as the court below finds, "no warrant issued as the result of scrutiny of lists of voters by commissioner and inquiries at residences."

The appellee's attorney seems to criticize, on page 4 of his brief, what he speaks of as an inference that a complaint was drawn wherever it was reported that an offense had been

committed, and that the investigation which should have preceded the drawing of the complaint was not made until subsequent thereto, and he suggests that the commissioner was not required to draw a complaint in every case where it was represented that an offense had been committed.

It would certainly be a plain dereliction of duty on the part of a commissioner to refuse to take a complaint charging a violation of law. If, afterward, instead of at once issuing a warrant, as he might properly do, he pursues an investigation and examination which satisfies him and the district attorney that the case ought not to be prosecuted further, such course may be commended, but he cannot lawfully decline to take the complaint in the first instance, and when taken he is entitled to payment therefor. The New York statute which governs him provides: "When an information is laid before a magistrate of the commission of a crime, he must examine on oath the informant and prosecutor and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them," and "if the magistrate be satisfied therefrom that the crime complained of has been committed, and that there is reasonable ground to believe that the defendant has committed it, he must issue a warrant of arrest" (Secs. 148-150, N. Y. Code of Crim. Proc.).

The taking of the complaint is therefore an act complete in itself, and necessarily precedent to the issue of the warrant and subsequent examination.

The theory of the government's counsel seems to be that the commissioner should investigate an offense before any charge is made before him that an offense has been committed. How is the commissioner to determine whether an offense has been committed or who had committed it until a formal complaint under oath has been made before him charging a violation of law?

That no needless or superfluous complaints were taken is

evident from a brief reference to the figures showing the number of complaints taken.

In the finding upon Item 23 (R., p. 9) the charge for the complaint and other services where no warrant was issued is stated to be $1.15, showing that the $742.20 charged in that item covered rather less than 650 such complaints. The period as stated in the findings (R., p. 7) embraced three congressional elections, making an average of less than 220 such complaints at an election. This, in a city of nearly a million people, which will be conceded as Brooklyn's population, gives an average of one such complaint to about 4,500 people, certainly a much smaller number than might be expected under such conditions.

The finding as to Item 1 states the folios of complaints at the two elections of 1886 and 1888 as 3,915 folios, of which 367 folios were for crimes of a general character, leaving 3,548 folios in election cases which, at four folios each, as stated on Record, page 9, gives 887 complaints at the two elections, or an average of 444 at an election. This for approximately a million of people averages one such complaint to over 2,200 people, which is certainly a minimum number, especially in view of the fact that one of these elections was a Presidential election, with its attendant excitement and incentives to fraudulent registration and voting.

It is manifest from the foregoing that whatever a casual view of the charges might suggest an examination of the figures in detail shows clearly that the verified complaints taken were far fewer in number than might reasonably be expected, and that the appellant was entitled to especial commendation for pursuing a course keeping the expense of enforcing the election law, through its penal provisions, down to so low a figure in the manner indicated.

Further, the attention of this court is especially called to the express language of the order of the United States district court for the eastern district of New York, as set forth in Finding 2 of the Court of Claims (R., p. 7), which

is similar in all respects to all other orders of said court in the premises, as shown by Appendix C, approving the accounts of appellant herein sued for, and other accounts covering a period from 1878 to December, 1892, as follows:

"And it appearing to the satisfaction of the court by said oath *that the services herein charged for have been necessarily and actually performed, and no item of said account having been objected to by said United States district attorney, who appears for the government in the matter of the approval of said account,*" * * *

Here we see that the United States district attorney, having immediate cognizance and control of the particular cases wherein charges are made was *present in court,* and being informed of all the facts and particulars of each and every case and charge, made no objection to the approval of said account wherein such charges were made. The court also finds that the services were *necessarily* performed. These facts should enlighten this court greatly in its consideration of the statement contained in Finding III, Items 1 and 2, viz.: "No arrests were made because inquiry developed the fact that no offense had been committed."

Counsel for appellee, in his brief, on pages 5 and 6, makes certain reference to Item 11 (R., p. 9), in which he admits that the certificates charged for were upon the *original* complaints, but by way of excuse for the non-payment of this charge, states appellant "was both the Commissioner who *pretends* to have certified the complaints and records pertaining thereto and the chief supervisor to whom the certificates would go."

In answer, appellant calls attention to the fact that the court below, by said Item 11, in Finding III, found that said "certificates" were *actually made* upon the papers in question, and filed in the office of the chief supervisor of

elections, as claimed by appellant, and, therefore, the use of the words "who *pretends* to have certified the complaints and record, etc.," is not warranted by the findings.

The statute required the forwarding, with the complaints, of all examinations, papers and records pertaining thereto (R. S., Sec. 2027), for preservation and future reference, and it was manifestly essential that the papers in each, which might be numerous and not in themselves necessarily showing what they were, should be put together, and in such form authenticated by a certificate showing what they were, and their official character entitling them to be filed and preserved, not only for information of the chief supervisor who filed them, but for all persons or courts having occasion to call for them in the future (see also first brief, p. 22).

Counsel for appellee in his brief (p. 6) contends that there was no necessity for certificates to complaints and other papers referred to in Item 11.

The contrary is apparent from the two judgments referred to on page 24 of our first brief, one by the Court of Claims, and another by the United States District Court for the eastern district of New York, as shown in appendix to our first brief, "A and B," and no appeal was taken by the Attorney General in either case. In U. S. *vs.* Finnell (185 U. S., 244), where a judgment had been rendered by the Court of Claims in another suit in favor of the appellant for similar services, and no appeal was taken by the Attorney General, the Supreme Court said:

"On his account, for the period from January 1st, 1892, to June 30, 1894, he obtained judgment in the Court of Claims, which judgment was paid, no appeal having been prosecuted by the United States (Finnell *vs.* U. S., 32 Ct. Cls., 634). It thus appears that the Government has for many years construed the statute of 1887 as meaning what we have said it may fairly be interpreted to mean, and has settled and closed the accounts of clerks upon the basis of such construction."

The principle here announced applies with equal force to the construction placed upon the fee bill by the appellant in this case.

Appellee's counsel seems to regard the so-called Tucker Act of 1887 as authorizing the allowance of the counter-claim, even though the accounts on which it was based were not opened by appellant, and even though no running account existed between appellant and the United States.

The Tucker Act made no change in the law applicable to this counter-claim.

Sec. 1059, R. S., gave the Court of Claims jurisdiction to hear and determine certain matters, among which were:

"All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any person making claim against the Government in said Court."

The Act of March 3, 1887, added certain classes of claims of individuals to those suable in the Court of Claims, and deprived it of jurisdiction over certain others. For example, it added all claims in respect of which the party would be entitled to redress in a court if the United States were suable, and took from it claims for pensions, war claims, etc. The purpose of the act was declared in its title, "An act to provide for the bringing of suits *against* the Government of the United States." It was intended to benefit the claimant, and did so materially by permitting him to sue also in the local district courts in certain cases.

It left the status of the Court of Claims as to counter-claims unchanged, giving to that court jurisdiction to hear

"All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the Government of the United States against, etc."

These are the exact words of the old statute. The law has not been changed and the rules and decisions governing the allowance of counter-claims stand unaffected, and as stated in our first brief. The case of *Atlantic Contracting Co.* (35 Ct. Cls., 30), cited by counsel merely held that that court has jurisdiction to hear a claim "which can be *properly pleaded* by way of set-off or counter-claim."

This is no way conflicts with the point made in our first brief, that the counter-claim in this suit should not be allowed because it is not such a claim as can be properly maintained under the law and authorities which we have cited.

We also refer to the following case, where the same principle was announced: Patterson *et al. vs.* The United States, 28 Ct. Cls., 321.

In this connection we deem it proper to call attention to the relation between the items in the findings (R., p. 10) and the *periods* of the accounts in the counter-claim which are unconnected and as follows:

Period of 1st counter-claim, July to Dec., 1886.
" " 2nd " July, 1888, to June, 1889.
" " 3rd " July, 1890, to June, 1891.
" " 4th " July to Dec., 1892.

No item in the findings relate to the above 4th period.

Item 1 is found as from Feb'y, 1886, to June, 1889, which includes four months preceding the above 1st period and one and one-half years between the 1st and 2nd periods.

The other items disallowed are found generally as from Feb'y, 1886, to January, 1892 (R., p. 7), but no precise dates are found. There was one and one-half years between the above periods of 1st and 2nd counter-claims and a year between the 3rd and 4th.

There was no definite relation, therefore, between the items and particular accounts in the counter-claim.

That the counter-claim is not such a claim as can properly be maintained in this suit is clearly shown by the following points:

The services and fees in the accounts covered by the counter-claim were authorized by sections 1982, 828, 847, Revised Statutes (First Brief, p. 25).

The accounts in the counter-claim were presented in the presence of the U. S. Attorney to the U. S. court, which entered orders approving them as just and according to law, and they were afterward submitted to the accounting officers, and, after examination and explanations duly furnished, were paid (First Brief, p. 26).

There is not a scintilla of proof in the record that the United States court made any mistake in approving the accounts in the counter-claim, and in the absence of such proof the orders of approval are conclusive (First Brief, p. 26).

The accounts in the counter-claim were not allowed by the accounting officers by *mistake,* but in accordance with the uniform and continuing practice and construction of the law for many years allowing detail fees and no others in election cases, both before and after arrest (First Brief, p. 27).

The accounts in the counter-claim were allowed in accordance with a uniform practice of long standing never then questioned, and now objected to upon a point of law *now raised for the first time and not yet decided* (First Brief, p. 27).

No accounts here sued upon reopen any former accounts settled and paid. The court below found that *"No disallowed balance in any account to which the counter-claim relates is sued for herein"* (R. p. 10), and *"The fees in Items 1 to 17 are not balances unpaid upon accounts presented and settled by the accounting officers; they are fees not previously charged in any former account"* (R., p. 9).

No running account exists between the government and a commissioner of the circuit court (First Brief, p. 29).

The circumstances connected with the court's approval,

the investigation and the allowance and payment of the accounts counter-claimed are such as to make recovery inequitable, unjust, and unlawful (First Brief, pp. 32-42).

Counsel for appellee appears to criticize the production of certified copies of certain court records and annexing them to our brief for reference.

We reply that it is assumed that this court will take judicial notice of all judicial proceedings of a court of record, whether published in printed volumes of reports, or brought into court as certified copies, if not printed in such volumes.

The copies in question are judicial proceedings in courts of record, and as they do not appear in any printed volumes it is impracticable to produce them in any other way than as certified copies, and they are therefore presented to this court for its inspection as judicial authorities.

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